A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW. By John Henry Wigmore. Boston: Little, Brown & Company, 1904. Vol. II, pp. xxi, 1003–1974.

One of the matters dealt with in the opening chapter of Volume II is the Impeachment of One's Own Witness (§§ 896–912). It is an excellent illustration of the high character of the entire work. The history or the rule, the erroneous reasons sometimes advanced to support it, the sound reason upon which it rests, its application to the various possible sorts of impeachment, the reasons *pro* and *contra* as to each application, the state of the law in the various jurisdictions, the discriminations determining who is one's own witness, these are the topics discussed. What more could be desired? In fact the entire treatment of impeachment and rehabilitation of witnesses is, it is believed, far ahead of any other presentation of the subject.

There are other discussions which call for special commendation in this second volume. The solution of the difficuities of the so-called privilege for offers of compromise (§§ 1061–1062) seems thoroughly sound and will be welcomed by many. There is no privilege according to Mr. Wigmore. A mere offer implies a desire for peace rather than a real concession of liability and so is excluded as of too slight weight as an admission; the statement of fact in such an offer, however, cannot be thus explained and therefore is admissible. The admissibility of the account-books of private corporations is usually classified as an anomalous extension of the Hearsay Exception for Public Documents. In § 1074 it is shown that, if the rule as to parties' shop-books is kept in mind, the anomaly disappears.

The treatment of the subjects usually classified under the "Best Evidence" rule is most excellent. Professor Wigmore follows Professor Thayer in concluding that the term "Best Evidence" has outlived its usefulness and at present but breeds confusion and misunderstanding (§§ 1173–1174). This seems demonstrated. The rule that documentary originals must be produced if available, the rule that an attesting witness must be called if possible, and the other scattered instances of preferred testimony are thoroughly expounded. Perhaps the most interesting single matter is the distinction drawn between real cases of conclusive evidence and cases where one fact is substituted as the equivalent of another and thus all evidence of the latter made immaterial (§§ 1345 ff.).

The final third of the volume contains about half of the discussion of the Hearsay rule and its exceptions. The most interesting questions concerning hearsay, namely, the true limits of the rule, the *res gestæ* confusion, and the verbal act doctrine, are rightly left for treatment until after the simpler matters, the well-understood exceptions, have been presented. They thus fall in the third volume. But there is interesting material in this one. The history of the Hearsay rule is well presented (§ 1364). Professor Wigmore concludes that our present rule originated about 1675. This is contrary to Professor Thayer's view, that it is simply a continuous development of the early similar rule for deed and transaction witnesses. Thayer, Preliminary Treatise on Evidence, 498–501. In the light of Mr. Wigmore's authorities, his conclusion appears correct. Much amusing material is gathered to illustrate the value and methods of cross-examination (§§ 1367–1368). Proving the signature of an attesting

witness is considered an exception to the Hearsay rule (§§ 1505–1514). This is novel but entirely sound.

In this, as in the first volume, the questionable results are almost entirely concerned with classification. Many lawyers will be surprised to find the subject of Admissions under Impeachment of Witnesses. Probably it does not belong there. The excuse for so classifying it lies in the analogy between discrediting the testimony of a witness by inconsistent statements and discrediting a party's case by his inconsistent statements. The great difference between the two consists in the fact that the inconsistent statements of a witness are usable merely to discredit him and not as evidence of the facts asserted in them (§ 1018), while the admissions of a party are given value as affirmative evidence. Despite the paucity of authority (§ 1048) there can be no doubt of this. No exception has so far been established even in the very unusual cases where the admission was not against interest when made. The truth seems to be that admissions form a separate exception to the Hearsay rule. Pointing out that this exception is different from that for declarations against interest (§ 1049) in no way proves that an exception for admissions does not exist. Admissions by conduct, of course, do not fall under this exception as conduct is not assertion and therefore not hearsay. They are no doubt peculiar, however, in being admissible though the party had no knowledge of the fact thus impliedly admitted (§ 1053).

Professor Wigmore has attempted to classify the law of Evidence according to the reasons underlying the various rules of exclusion. But any particular rule may be founded on more than one reason. Where, then, should it be classified? This difficulty makes the attempt a hazardous one. The Hearsay rule may be taken as an example. It is placed under Rules of Auxiliary Probative Policy rather than under Relevancy. Yet, if we take the author's view of relevancy, that whenever evidence is excluded because of its slight probative value a rule of revelancy is involved, the Hearsay rule seems to fall in that category. Surely it is because a statement made out of court, not under oath, and not subject to cross-examination is of slight probative value that we exclude it. Again, among Rules of Auxiliary Probative Policy, he considers the Hearsay prohibition an Analytic Rule, meaning thereby that it is a rule demanding that evidence be analyzed, scrutinized, or tested by cross-examination before it is received. He insists, accordingly, that the lack of cross-examination is the objection to hearsay (§ 1362). This is doubtful. Many judges have said that the absence of an oath and the perjury-penalty is another reason for rejecting it (§ 1362). That confrontation of the witness with the jury and the party against whom he testifies does not occur when hearsay is admitted, is another objection which has played a part in the development of the rule (§ 1364, note 47). That statements under oath are not admissible if cross-examination and confrontation be absent, proves only that the want of the oath is not the sole ground for excluding hearsay. Depositions taken without fully complying with a statute authorizing them seem to present a case where cross-examination has been had. Yet they are not admissible (§§ 1376, 1418). This indicates that the non-existence of an opportunity for cross-examination is also not the sole ground of re-

jection. The Hearsay rule is based on more than one reason. It should not be classified as if founded on but one.

In this last connection one may notice that, in accordance with this idea that absence of cross-examination is the only defect in hearsay, Professor Wigmore considers depositions, testimony at a former trial, testimony at a preliminary hearing, and like evidence as being outside the hearsay prohibition entirely. Professor Thayer treats them as one exception to the rule. Thayer, Cases on Evidence, 2d ed., 315. This seems the sounder view.

REVIEWS TO FOLLOW:

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